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IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICUS* [1]

Amicus curiae, the National Treasury Employees Union ("NTEU"), is a federal sector labor organization that is the exclusive bargaining representative of approximately 150,000 federal employees in about thirty agencies and departments nationwide. NTEU's members at such agencies as the Bureau of Customs and Border Protection, the Nuclear Regulatory Commission, and the Food and Drug Admin-

[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, made any monetary contribution to the preparation or submission of this brief.

istration perform functions that are critical to the public safety and homeland security. Its members also occupy key positions in the formulation of tax policy at the Internal Revenue Service, and play important roles in regulating the financial industry in the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency. In these positions, employees often have occasion to express their opinions and to make recommendations to both agency officials and members of the public that they serve. And, like all federal employees, they have an obligation to disclose wrongdoing whenever they observe it on the job. They thus have a vital interest in the scope of constitutional protections afforded them by the First Amendment when they speak on matters of public concern related to their government employment, whether that speech occurs in the workplace or off-site.

In recognition of that vital interest, NTEU has frequently been a party or *amicus* in proceedings that involved issues relating to the First Amendment rights of federal employees. *See, e.g., United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998) (*amicus*); *Sanjour v. Envtl. Prot. Agency*, 56 F.3d 85 (D.C. Cir. 1995) (en banc) (*amicus*). It files this brief in order to provide the Court with information concerning the practical significance and potential consequences to public employees of the position advocated by petitioners, if it were to be accepted by this Court.

SUMMARY OF ARGUMENT

Speech by public employees on work-related matters—addressing current government policies or activities of their own departments or agencies, for example—is speech on classic matters of public concern. Petitioners would categorically deny constitutional protection to much of this speech, despite its importance to the public's understanding

of its government, whenever the speech can be characterized as "in furtherance of the employee's job duties." This approach would unnecessarily chill speech that furthers the interests of the public and the government itself. It is also based on a misreading of the precedent of this Court and is unworkable in its application.

Again and again, public employees, armed with their specialized expertise and data or other insights resulting from their work, have served the public interest by exposing wrongdoing or waste of government funds and by presenting unpopular but objectively sound conclusions and opinions, often in contexts that involve the performance of their duties—or that could be so characterized. This speech is entitled to constitutional protection, subject to the *Pickering* balancing test, consistent with this Court's longstanding protection of speech by public employees on matters of public concern. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). As the Court has recognized, informed debate requires the input of public employees. In fact, the closer the relationship between employees' speech and their work duties, the better equipped the employees are to contribute to the public and the government interests. This is the very speech that petitioners would have this Court inhibit, by limiting the protection to speech by employees less intimately involved with the issue and therefore less able to contribute meaningfully.

Petitioners rest their argument on an artificial distinction between what they call "citizen speech" and "employee speech"; they define the latter to include all "work-required" speech. Petitioners argue that only "citizen speech"—as they define it—is entitled to constitutional protection. This distinction, based on the "hat" that the employee is wearing when speaking, is not supported by this Court's precedent. The references in this Court's precedents to "employee speech" and "citizen speech" were more in the nature of

shorthand terms, intended to aid in distinguishing between two possible types of expression, *both* of which consist of speech by individuals who are simultaneously "employees" and "citizens." Contrary to petitioners' view, the focus must remain on the subject matter of the speech and, specifically, on whether it addresses a matter of public concern or whether it involves a matter of purely personal concern.

Petitioners' proposed test not only leads to absurd results, but is unworkable. The inquiry into whether speech is in furtherance of an employee's duties is highly subjective and vulnerable to multiple interpretations. The proposed test also creates perverse incentives that thwart internal problem-solving on such vital topics as safety, scientific integrity, and mismanagement—all of which are matters of considerable public concern. Moreover, because *Pickering*'s balancing test provides ample protection to legitimate government interests, petitioners err in claiming that a limit on the scope of constitutionally protected speech is necessary to avoid disruption of government operations. There is, in short, no reason to disturb the long-standing framework under which both work-related speech and work-required speech on matters of public concern are weighed under the *Pickering* balance, in order to protect the interests of all: the public, the employee, and the government employer.

ARGUMENT

SPEECH BY A PUBLIC EMPLOYEE ON MATTERS OF PUBLIC CONCERN IS NOT STRIPPED OF CONSTITUTIONAL PROTECTION MERELY BECAUSE IT IS WORK-RELATED SPEECH MADE IN FURTHERANCE OF THE EMPLOYEE'S DUTIES

A. This Court Accords First Amendment Protection to Work-Related Speech by Public Employees on Matters of Public Concern

This Court has long recognized that one of the bedrock principles of our society is free and open debate. Public employees play an important role in the debate on public affairs. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 464 (1995) (noting that federal employees have made "significant contributions to the marketplace of ideas"). Participation by public employees in "free and open debate [on important public questions] is vital to informed decision-making by the electorate." *Pickering v. Board of Educ.*, 391 U.S. 563, 571-72 (1968). It is also vital to informed decision-making by the government. Public employees make invaluable contributions, whether they express their opinions privately to their employer or openly, directly to the public. *See Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979).

There is no question that the government, in its capacity as employer, may impose restraints on the job-related speech of public employees that would be unconstitutional if applied to the public at large. *See Waters v. Churchill*, 511 U.S. 661, 671-675 (1994) (plurality). Nevertheless, the Court has granted First Amendment protection to work-related speech by public employees on matters of public concern. In *Pickering*, the Court adopted a balancing test under which the interests of the employee in commenting on matters of public concern are balanced against the interest of the government,

as employer, in promoting its efficient operation. *Pickering*, 391 U.S. at 568; *see also Connick v. Myers*, 461 U.S. 138, 145-47 (1983). This protection accorded to a broad range of speech by employees on issues relating to government operations well serves the public interest.

1. This Court's seminal case of *Pickering* is founded on the recognition that "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." *City of San Diego v. Roe*, 125 S.Ct. 521, 525 (2004); (citing *Pickering*, 391 U.S. at 572) ("Teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent."); *see also Waters*, 511 U.S. at 674 (plurality) (observing that public employees "are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions"); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (citing *Waters*, 511 U.S. at 674) (explaining that retaliation for speech by government contractors may chill speech by those who, "because of their dealings with the government," may best know government ailments).

Indeed, informed decisions concerning public affairs can hardly be made if the opinions of the very members of the public most qualified to speak on such matters are categorically silenced. "[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574; *accord Rankin v. McPherson*, 483 U.S. 378, 384 (1987). The interests that would suffer, as a consequence, are not just those of the employee: "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Roe*, 125 S.Ct. at 525; *accord Pickering*, 391 U.S. at 572; *see also NTEU*, 513 U.S. at 470 (disincentive to federal employees' free speech imposes a "significant burden on the public's right to read and hear what the employees would otherwise have written and said"). Interference with this flow of information would significantly impair the public's ability to monitor the performance of essential government operations.

Finally, the government itself would be significantly injured if members of its workforce were discouraged from identifying problems in government initiatives that require correction. The government as employer, as well as the government as sovereign, benefits from constructive criticism and from prompt exposure of operational flaws, which enable it to take appropriate corrective action. *See, e.g., City of Madison v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 177 (1976) (highlighting board of education's interest in hearing teacher's views on school operations); *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (interests of employer and employee are co-extensive when employee reports misconduct; goal for both is proper functioning of organization).

2. In determining which speech by public employees is to be accorded the protection of the First Amendment and, therefore, subject to the *Pickering* balancing test, this Court examines whether the speech addresses a matter of "public concern" or whether it involves a matter "only of personal interest." *Connick*, 461 U.S. at 146-47.

Matters of public concern are broadly defined to include speech fairly related to "any matter of political, social, or other concern to the community." *Id.* at 146. Recently, the Court has further explained that matters are of "public concern" when the subject is of "legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Roe*, 125 S.Ct. at 525-26.[2] This includes

[2] In *Roe*, the Court also examined whether the speech in question would have satisfied the definition of public concern articulated by the

information relating to actual or potential wrongdoing or breach of trust by a public official, and an agency's efficient performance of its duties. *Connick*, 461 U.S. at 146. It also includes "statements criticizing public policy and the implementation of it." *Rankin*, 483 U.S. at 387.[3]

Matters of purely private interest, which are not entitled to constitutional protection, most commonly include speech addressing a personal employment dispute, such as the employee's individual work-related grievances. *Connick*, 461 U.S. at 148-149; *accord NTEU*, 513 U.S. at 466 (speech involving only "complaint about a change in the employee's own duties" fails to meet the public concern test). This category, however, also encompasses other speech at work, unrelated to personal grievances, that simply does not amount to a matter of public significance,[4] as well as private off-duty

dissent in *Connick*: whether the employee "discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official charged with managing a vital governmental agency, discharges his responsibilities." *Roe*, 125 S.Ct. at 526 (citing *Connick*, 461 U.S. at 163) (Brennan, J., dissenting).

[3] *See also Rodgers v. Banks*, 344 F.3d 587, 600-01 (6th Cir. 2003) (complaints by director of quality management for mental health facility implicated the public concern because they addressed facility's disregard of patient privacy); *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1292 (11th Cir. 2000) (alleged cover-up by police chief and officers of criminal conduct of a family member of elected official is matter of public concern); *Lewis v. Cowen*, 165 F.3d 154, 164 (2d Cir. 1999) ("the public fisc is a matter of public concern"); *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996) (question of whether police officers are performing their duties is a public safety issue and therefore an issue of political or social concern).

[4] *See, e.g., Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (profanity used by college professor in class while criticizing students' poor attitude); *Campbell v. Hamilton County*, 2001 U.S. App. LEXIS 22884 (6th Cir. 2001) (unpublished) (derogatory comment about a judge by a probation officer to probationer before hearing on probation violation).

expression by employees on non-work-related topics that does not add to the public debate.[5] *See Roe*, 125 S.Ct. at 526 (finding that the making and marketing of pornographic videotapes by an off-duty police officer was speech that "did nothing to inform the public about any aspect of the [police department's] functioning or operation" and did not relate to any other issue of concern to the community).

Applying these principles to the "enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal" (*Pickering*, 391 U.S. at 569) must be done on a case-by-case basis. This Court has repeatedly declined invitations to adopt a bright-line rule. *See id.* at 370 ("we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged"). *Accord Umbehr*, 518 U.S. at 678 ("*Pickering* requires a fact-sensitive . . . weighing of . . . interests); *Givhan*, 439 U.S. at 415 (declining to adopt bright-line rule that internal, work-related speech is unprotected). Instead, the Court examines the "content, form, and context of a given statement, as revealed by the whole record," to determine whether an employee's speech addresses a matter of public concern. *Connick*, 461 U.S. at 147-148. Of particular significance here is this Court's explicit refusal to limit constitutional protection to employee speech that is expressed in the public arena. Instead, the Court has held that speech does not lose its protection if it is expressed privately

[5] The government, of course, may only discipline an employee for off-duty misconduct if there is a sufficient showing of a nexus between the alleged misconduct and the employee's ability to accomplish his or her duties or some other legitimate government interest promoting the efficiency of the service. *See* 5 U.S.C. § 7513(a) (a federal employee may be removed "for such cause as will promote the efficiency of the service"); *accord* 5 C.F.R. §§ 731.201, 752.403. *See generally, Crofoot v. Gov't Printing Office*, 761 F.2d 661, 664 (Fed. Cir. 1985); *Doe v. Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977).

to the employer, rather than in a public setting. *Givhan*, 439 U.S. at 415. The focus is thus squarely placed on the subject matter of the given statement, rather than its audience.

The lower courts that have applied the *Connick/Pickering* test over the years have found a wide range of speech by public employees communicated at the workplace and/or on topics related to their public employment to involve matters of public concern.[6] This includes speech on work-time, in the workplace, to a co-worker,[7] a supervisor,[8] or some other

[6] At the same time, of course, much work-related speech may be unprotected if, for example, it does not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government." *Lee v. Nicholl*, 197 F.3d 1291, 1295 (10th Cir. 1999) (citation omitted). Petitioners are thus incorrect when they claim that "virtually all" job-required speech would be constitutionally protected if the lower court is not reversed. *See* Pet. Br. at 11. *But see* Pet. Br. at 36 (suggesting that protection of job-required speech would have a greater impact on those government offices where subjects related to matters of public concern are "constantly discussed" or "where employees' primary job duties are to speak about such matters").

[7] *See, e.g., Rankin*, 483 U.S. at 382 (clerk told colleague, after President Reagan was shot, that she hoped any subsequent attempt on his life would be successful); *Connick*, 461 U.S. at 149 (Assistant District Attorney circulated questionnaire soliciting views of colleagues on, *inter alia*, whether they felt pressured to work on political campaigns).

[8] *See, e.g., Givhan*, 439 U.S. at 413 (teacher's complaint to her principal about employment practices perceived to be racially discriminatory in purpose or effect); *Taylor v. Keith*, 338 F.3d 639, 641 (6th Cir. 2003) (police officers filed routine report indicating that another officer had problem with using excessive force); *Rodgers*, 344 F.3d at 592 (director of quality management wrote letter to hospital CEO complaining about hospital's failure to remedy problem of patient privacy); *Delgado v. Jones*, 282 F.3d 511, 514 (7th Cir. 2002) (police officer presented memorandum to his lieutenant which stated that his investigation led him to conclude that a close personal relative of an elected official was involved in criminal drug activity); *Dill v. City of Edmond*, 155 F.3d 1193, 1200-01 (10th Cir. 1998) (police officer wrote a letter to Chief of

supervisory body.[9] It also encompasses speech on breaktime but in the workplace,[10] and speech on the employee's own time, off-site, to an outside entity.[11] It even includes an employee's *refusal* to make a supervisor-ordered statement to a superior supervisory entity.[12] Topics have ranged from speech relating to the employee's working conditions[13] or those of co-workers,[14] to speech relating to the conditions of the employee's "customers."[15] Often, the speech reports the re-

Police stating that his on-the-job investigation led him to be aware of exculpatory evidence in a murder case).

[9] *See, e.g., Nicholl*, 197 F.3d at 1294 (letters to Board of County Commissioners); *Fikes*, 79 F.3d at 1081 (officer reported allegations of improper use of a confiscated vehicle and failure to terminate a high speed chase to the Alabama Bureau of Investigation); *Kennedy v. Tangipahoa Parish Library Sys.*, 224 F.3d 359, 363 (5th Cir. 2000) (library employee wrote letter to Library Board of Control and branch managers suggesting that library employees not be alone in library for safety reasons).

[10] *See, e.g., Waters*, 511 U.S. at 664-65 (nurse made statements to colleague, while at work but on a break, about hospital working conditions).

[11] *See, e.g., Pickering*, 301 U.S. at 566 (teacher wrote letter to newspaper editor criticizing Board of Education); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (teacher called radio station to publicize school's plan to implement teacher dress code); *Perry v. Sindermann*, 408 U.S. 593, 595 (1972) (advertisement critical of college administration appeared over teacher's name).

[12] *See, e.g., Lewis*, 165 F.3d at 159 (lottery officer refused to present proposed change to state lottery system to Board in positive light without presenting risks).

[13] *See, e.g., Kennedy*, 224 F.3d at 362-63, *supra*, note 9.

[14] *See, e.g., Connick*, 461 U.S. at 149, *supra*, note 7; *Givhan*, 439 U.S. at 413, *supra*, note 8; *Nicholl*, 197 F.3d at 1294, *supra*, note 9.

[15] *See, e.g., Rodgers*, 344 F.3d at 592-93, *supra*, note 8.

sults of an employee's investigation into misconduct by co-workers or public officials.[16]

The common denominator in all of these cases is obviously the work-related nature of the speech, whether because of the location where it is made or its content. The importance of the message to the public understanding—the degree of public concern implicated—is often directly correlated to the degree to which the message relates to the employee's duties. The more an employee knows about a particular topic (in many cases precisely because it is his or her particular area of work expertise), the more useful the speech will be in generating informed debate. The purpose of creating informed debate is ill-served by offering no First Amendment protection to the very speakers who can contribute the most.

B. Petitioners Would Deny First Amendment Protection to Much Work-Related Speech by Public Employees on Matters of Public Concern if It Happens To Be in Furtherance of the Employees' Duties

Petitioners ask this Court to adopt a new per se test, under which *all* employee speech found to be expressed "pursuant to the duties of employment" would be denied constitutional protection—regardless of whether it addressed a matter of public concern. Pet. Br. at 25-35. As we discuss below, this new test finds no support in this Court's jurisprudence. To the contrary, the Court's prior holdings point firmly to the opposite conclusion: that such speech is indeed protected, subject to the public concern test and, of course, the *Pickering* balancing test. In addition, as we demonstrate, the proposed new test is unworkable in application, unnecessary to protect

[16] *See, e.g., Taylor*, 338 F.3d at 640, *supra*, note 8; *Delgado*, 282 F.3d at 514, *supra*, note 8; *Baldassare v. New Jersey*, 250 F.3d 188, 192-93 (3d Cir. 2001); *Dill*, 155 F.3d at 1201, *supra*, note 8; *Fikes*, 79 F.3d at 1081, *supra*, note 9.

the government's legitimate interests, and will inevitably chill speech that furthers the interests not only of the speaker but also of the public and the government.

1. Petitioners have misread the *Connick/Pickering* framework as establishing a "citizen/employee" dichotomy, under which the "hat" worn by the employee at the time of the speech is determinative. Thus, in addition to determining whether the speech was on a matter of public concern or addressed purely personal matters, petitioners would have the courts evaluate whether the speech was made in the employee's "personal" capacity—deemed to be "citizen" speech —or whether it was made by the employee qua "employee." The latter category, according to petitioners, necessarily encompasses all speech that is variously described as "job-required" (Pet. Br. at 16), made "pursuant to the duties of employment" (*id.* at 25), or made "during the normal course and scope of employment, in accordance with the duties of employment" (*id.* at 27).[17] In essence, petitioners would try to identify a subset of employee speech that is job-required and deprive it of any constitutional protection.

There is nothing in *Connick*, *Pickering*, or any other precedent of this Court to indicate that the Court considers anything other than the speaker's message itself to be relevant to the first prong of the *Pickering* balancing test.[18] Certainly

[17] The United States, as *amicus*, prefers formulations that reference the carrying out of "job duties" or "job responsibilities." *See, e.g.*, U.S. Br. at 9, 15, 16, 25, 28.

[18] Petitioners misread *NTEU* in citing it as support for their claim that this Court places weight on the absence of any "relevance" to government employment in finding speech protected. Pet. Br. at 27. *See also* U.S. Br. at 17. The Court there stressed the lack of a nexus between the speech and the speakers' government jobs as part of its finding that the government's interest was slight and could not justify the burden placed on speech by the statute at issue. *NTEU*, 513 U.S. at 474. It certainly did not suggest that the speech would be unprotected—and the *Pickering* balance unnecessary—if the speech had had a closer tie to the employees' jobs.

there is nothing to show that the Court intended the role of the speaker to be dispositive. To the contrary, this Court in *Givhan* discussed *only* whether private expression is constitutionally protected, and did not find it necessary to determine whether the teacher was speaking as an "employee" or "citizen" when she raised her concerns about racially discriminatory practices in a meeting with her principal. 439 U.S. at 413-16.

In *Connick* itself, the Court focused only on the content of Myers' speech and did not address the fact that she was undeniably wearing her employee "hat" when she circulated the questionnaire on the job, during office hours, and to her colleagues. Had that questionnaire been a means of informing the public "that the District Attorney's Office was not discharging its governmental responsibilities in the investigation or prosecution of criminal cases," the Court suggested that Myers would have been engaging in speech "as a citizen" on matters of public concern. *Connick*, 461 U.S. at 148. That speech, of course, would have been intimately connected to her professional responsibilities as a prosecutor and arguably as "required" by that work as were Ceballos' disclosures in the instant case.

Petitioners err in attaching substantive significance to the reference in *Connick* to speech "*as a citizen* upon matters of public concern," which is compared to speech "*as an employee* upon matters only of personal interest." *Connick*, 461 U.S. at 147 (emphasis added). This reference is more accurately viewed as a shorthand way of capturing and distinguishing between the two possible types of expression, *both* of which consist of speech by *employees* that has some nexus to government employment. As shown *supra*, pp. 8-9, "employee speech" most often refers to speech relating to employee grievances or other personal problems of the employee in the workplace of limited general interest. Similarly, under the *Connick/Pickering* line of cases, "citizen

speech" refers to speech by employees either at work or off-work but on work-related matters, in both instances where the speech has ramifications beyond the workplace. Thus, "citizen speech" simply connotes "major issue of broad import" while "employee speech" connotes "minor, personal issue."

There is no indication that the Court intended any other weight to be accorded to the terms. Indeed, as shown below, the distinction that petitioners would draw between "employee" and "citizen" is illusory and virtually impossible of application. It is axiomatic that public employees are simultaneously citizens who largely retain their First Amendment right to comment on important issues of the day. *See Pickering*, 391 U.S. at 568.[19] They can speak as "citizens"—meaning on important issues—both on and off the job. Attempting to ascertain the "capacity" in which they are speaking at any particular time simply does not advance the relevant inquiry, which is whether the message addresses a matter of public concern.

2. The test proposed by the petitioners leads to artificial distinctions and absurd results. There can be no merit to a test that would deprive any constitutional protection to Pharmacologist A's discussion with his supervisor about his findings regarding the side effects of a drug that he was assigned to analyze, while protecting that identical speech if uttered by Microbiologist B who learned of the issue from his

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[19] *Pickering* similarly referred to "citizen speech" in discussing the need to balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. This reflects the Court's concern for protecting all speech by public employees on matters of public concern, subject, of course, to the balancing test, for the critical reason that they *are* citizens and have a strong interest in making their views heard.

friend A in the FDA cafeteria. It is similarly absurd—and contrary to this Court's holding in *Givhan*—to deny protection to A's internal communications with his superiors on the side effects, while protecting A's lunch-time conversations with B (and A's subsequent efforts to alert the public to the drug's harmful potential).

In drawing such arbitrary and irrational distinctions, petitioners have created perverse incentives that run counter to broader government interests. The government has a critical interest in establishing an environment in which employees do not fear to raise concerns in a timely fashion on important issues, such as potential problems with the construction of a nuclear power plant, dangerous lead levels or bacterial contamination in the water supply, or gaps in border crossing controls that could permit entry by a terrorist. It similarly has an important interest in resolving allegations of wrongdoing or disputes over policy before the problems reach a critical level. In an optimum world, this is done quickly and internally. Neither of these interests is advanced by petitioners' proposed test; to the contrary, they are affirmatively thwarted by it.

Speech in furtherance of employees' duties—speech that perhaps has the most potential of making an informed contribution to the public debate—is also the speech that is the most vulnerable to suppression. Agencies, under the guise of supervisory review or high-level policy review, have been known to tone down messages of potential hazards, or to censor them entirely. Career public servants have seen their reports amended or suppressed because they did not conform to the general policy objectives or political imperatives of the current political appointees heading their respective agencies or other reviewing authorities within the Administration. Dr. David Graham, the scientist with the FDA who was directed

to soften his conclusions regarding dangerous side effects of Vioxx, is only one of many examples.[20] Those who protest

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[20] Graham, associate science director at the Office of Drug Safety at the FDA, prepared a study in which he concluded that the pain drug Vioxx had dangerous side effects. He claims that he was pressured by superiors to soften his conclusions, and that he complied only as much as he could to avoid compromising his "deeply held convictions." He was consequently threatened and ostracized by the FDA. The drug manufacturer withdrew Vioxx from the market when an independent study confirmed his conclusions. *FDA Failed Public on Vioxx, Scientist Says, at* http://www.msnbc.msn.com/id/6520630 (last updated Nov. 19, 2004); Marc Kauffman, *FDA Official Alleges Pressure to Suppress Vioxx Findings,* Washington Post, Oct. 8, 2004, at A23.

See also Andrew Eller, a biologist working on Florida panther-related issues with the U.S. Fish and Wildlife Service, who was terminated after accusing his agency of purposely relying on flawed scientific information regarding the Florida panther's likelihood of survival in the face of real estate development. The agency did so, he maintained, in order to facilitate the granting of construction permits to influential developers. The agency has reinstated Eller, conceding that some of his conclusions were correct. Manuel Roig-Franzia, *Biologist Rehired by the U.S. Fish and Wildlife Service*, Washington Post, July 6, 2005, at A15. It has been alleged that the agency is under severe pressure from its political superiors to accommodate campaign contributors. *See Public Employees for Environmental Responsibility: Campaigns: Scientific Integrity at* http://peer.org/campaigns/eller/index.php (last visited July 20, 2005).

John Fitzgerald, an environmental analyst with the U.S. Agency for International Development in 2002, was responsible for monitoring compliance on certain overseas development projects. He attempted to report to Congress legal violations and environmental mismanagement regarding questionable energy projects in Africa, South America, and Eastern Europe, but Treasury officials removed the information from his report before it reached Congress. His position was subsequently eliminated. *Whistleblower's Information Deleted by Treasury Department Before Report Went to Congress, at* http://www.bushgreenwatch.org/mt_archives/000194.php (September 28, 2004). In September 2004, the Merit Systems Protection Board granted him a hearing on the merits of his allegations, finding that he had made "a non-frivolous allegation of

and persist in pressing their conclusions—particularly those who feel compelled to take the dispute to Congress or the media—are prime targets for retaliation.

Denial of constitutional protection to such speech creates an obvious disincentive to report misconduct or to voice opinions that may be unpopular with superiors or managers. Perversely, the greater the magnitude of the problem and the cost, monetarily or politically, of correcting it, the greater is the risk to the small voice who is urging caution. Not all employees have the courage of Coleen Rowley, the FBI employee who attempted to draw attention within the FBI to its institutional failure to respond to indicators about impending terrorist attacks.[21] The employee who identifies a

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a protected disclosure." *Fitzgerald v. Dept. of Agric.*, 97 MSPR 181 (2004). His case was subsequently settled.

Richard Foster, Medicare's chief actuary, was responsible for providing cost estimates to Congress regarding several Medicare proposals under debate. Foster estimated that the actual cost of legislation would be 25% to 50% higher than the administration's public estimates but was prevented from providing his finding to Congress by the former Administrator of the Centers for Medicare and Medicaid Services (CMS). An investigation by the HHS Office of Inspector General concluded that CMS failed to provide the proper information requested by Congress and that the Administrator had warned Foster that he would be disciplined if he released his disfavored findings. *Statement of Dana Corrigan, Acting Principal Deputy Inspector General Department of Health and Human Services on Thomas Scully and Richard Foster Investigation* 07/07/04, *available at* http://oig.hhs.gov/publications/pressmaterials.html; *Medicare Chief Actuary Foster Says He Informed White House Officials in June That Medicare Legislation Would Cost More Than Lawmakers Expected*, (March 25, 2004) *available at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint+3&DR_ID=22867.

[21] Rowley, an FBI employee in the Minneapolis field office, wrote a letter to FBI Director Robert Mueller outlining her concerns that the FBI had not adequately responded to internal memoranda and other indicators about impending terror attacks prior to September 11, 2001. She attempted, without success, to contact Mueller's office to alert him to errors in his statements post-September 11 regarding the absence of advance warning

serious institutional lapse that may have contributed to the nation's vulnerability to a terrorist attack, like the employee who sees a safety risk threatening an imminent space shuttle flight or the opening of a new nuclear power plant, needs extraordinary courage to persist, once her views are heard and brushed aside. The loss of constitutional protection to this dissent only increases the disincentives. If these employees choose the safer course and remain silent, the cost to the public could be enormous. Protection of employees' freedom to speak out on such issues of public concern is essential to the proper and efficient functioning of agencies and the assurance of a safer and better-run nation.[22]

At the same time, it is essential that employees not be discouraged from raising these issues in the first instance within the agency. Denial of constitutional protection to speech made to a supervisor in the course of an employee's duties creates a strong disincentive to solve problems internally. Anyone advising an employee anxious to report a major problem uncovered on the job would have to counsel the employee to consider bringing the debate directly into

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indicators. She was therefore forced to contact Congress with her information. *FBI Whistleblower Describes "Roadblocks"*, *at* http://archives.cnn.com/2002/ALLPOLITICS/06/06/terror.lapses/ (June 6, 2002).

[22] Whether there are whistleblower protections is, of course, irrelevant to whether there should be constitutional protection. But, it should be noted that whistleblower protections are severely limited. Courts have denied whistleblower protection to employees who are performing their normally assigned duties in reporting waste, fraud and abuse. *See Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005); *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1351-54 (Fed. Cir. 2001); *Willis v. Dept. of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). The Federal Circuit has also held that mere differences of opinion on debatable policy decisions by agencies do not constitute protected disclosures under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). *See White v. Dept. of Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004).

the public forum, even given the risks that such disclosure would entail.

These difficult issues are circumvented if the government preserves current incentives to solve problems internally. A harmonious public employer-employee relationship is to be fostered, not hindered; such a relationship maintains and improves the organization in a more efficient manner than if the employee is forced to seek external aid.

3. Aside from its substantive defects, petitioners' test is, bluntly put, unworkable. As a practical matter, it would be impossible in the case of many government positions to determine precisely what speech was "required" or made "in furtherance of the employee's duties."

Petitioners themselves do not argue that all speech "on the job" or made while the employee was "on the clock" is unprotected. They similarly do not argue that all speech that *relates to* the employee's job is unprotected. Thus, they evidently concede that much speech on work-related topics by public employees to their co-workers or supervisors, during working hours and in the workplace, is still protected under their formulation. Courts attempting to apply their proposed test would therefore be faced with the daunting and subjective task of determining what, precisely, were the employee's job responsibilities and how the speech in question meshed with those duties.

The employee's position description is not likely to be particularly helpful in resolving this factual issue. Not all public employees have formal position descriptions; if they do have one, it often does not accurately reflect their actual daily duties. Some define their own assignments. Virtually all have occasion to perform tasks that are not specified among their formal job responsibilities, ranging from clerical support tasks such as word-processing, copying, and faxing, to training of colleagues, to filling in as needed to perform the

notorious "other duties as assigned." This is particularly true in times of crisis.[23] Moreover, in the federal government with the increased emphasis on the need for greater personnel flexibilities, more and more employees may be functioning under unwritten "performance expectations" that could take the form of "individual, team, and/or work unit goals or objectives." Department of Homeland Security Human Resources Management System, 70 Fed. Reg. 5272, 5274 (Feb. 1, 2005); *see also id.* at 5303 (to be codified at 5 C.F.R. § 9701.406(c)). These unwritten and vaguely defined "expectations" would compound the difficulty of determining exactly what the job "requires."

The lack of clarity in the precise nature of the employee's duties, however, is only part of the problem. Perhaps the more serious barrier to application of petitioners' proposed test is the broad discretion given to many government employees (particularly mid-rank and senior-level employees) in determining how they are to carry out their job responsibilities. The federal government, for example, employs a host of highly educated professional employees: scientists; engineers; architects; teachers and professors at primary, secondary, undergraduate and graduate levels; attorneys and judges; medical doctors and other health care professionals; accountants; economists; mathematicians and statisticians; historians; and chaplains—to name just a few. *See, e.g., Handbook of Occupational Groups and Families*, *available at* http://www.opm.gov/fedclass/gshbkocc.pdf

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[23] As illustrated in the wake of September 11, 2001, public employees have historically done whatever is necessary to help handle emergency situations. In any event, even assuming, *arguendo*, that employees did not volunteer, governments have ample flexibility to assign additional responsibilities. The Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.*, which covers labor relations in the federal sector for a majority of federal employees, specifies that agencies have the right "to take whatever actions may be necessary to carry out the agency mission during emergencies." 5 U.S.C. § 7106(a)(2)(D).

(August, 2002). These professionals fulfill their responsibilities in accordance with the general guidelines of their employing agency, but also in accordance with their profession's ethical proscriptions or standards and their own educated judgment. They frequently have enormous discretion in deciding, not only *what* they should be saying or doing, but also *how* and *when* they should be saying or doing it.[24] A chaplain with the Veterans Administration, a professor at the Naval Academy, an economist with the Federal Reserve, or a pharmacologist with the Food and Drug Administration does not have neatly cabined duties or predetermined methods for achieving his or her objectives.[25]

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[24] The Solicitor General is flatly wrong in claiming that public employees have "no personal interest" in the content of speech in furtherance of their duties. U.S. Br. at 19. As the majority pointed out in the decision on review, for many employees, "promoting the public good is a deeply personal mission that is at least as important as personal career advancement." *Ceballos v. Garcetti*, 361 F.3d 1168, 1175 (9th Cir. 2004). Public employees like the scientists at the Nuclear Regulatory Commission and the Food and Drug Administration care deeply about the issues on which they work; their professional conclusions are their own, the product of their educated judgments and the tenets of their profession. While the government employer obviously sets the general parameters of their work (and can discipline them for unacceptable performance), the employees themselves are personally responsible for the validity of their conclusions. Indeed, NRC and FDA both give employees the right to preserve in the record their professional disagreements of opinion. *See* 21 C.F.R. § 10.70 (FDA); NRC Directive 10.159 (The NRC Differing Professional Opinions Program). In both agencies, however, employees care so deeply about the integrity of their professional opinions, and feel so vulnerable to retaliation, that NTEU has negotiated contractual rights paralleling and supplementing those agency-mandated procedures. *See* NTEU-FDA Collective Bargaining Agreement, Art. 5, Sec. 20; NTEU-NRC Collective Bargaining Agreement, Art. 3.9.

[25] The difficulty in distinguishing between "job-related" and "job-required" speech is not, of course, limited to speech by professional employees. To illustrate: Most government employees are required to attend internal office meetings, to obtain general instructions or assignments, but it may be far from clear whether their decision to speak up at a meeting, volunteering concerns or lodging objections, is required by their job. Similarly, many government employees, such as IRS Revenue Officers and CBP Officers (formerly Customs Inspectors), regularly interact with members of the public in situations where it is virtually impossible to determine which statements are "job-required" and which are only "job-related."

Whether a particular report, speech, letter, or conversation with a member of the public is "required" by the job or only "related to" it may be impossible to determine, either by the affected employee, by his or her manager, or by the reviewing court, given the absence of a clear line between the two concepts.

4. The error in focusing on whether the speech is "required by" or "in furtherance of" employees' duties is further illustrated by the numerous responsibilities imposed on employees that are unrelated to their particular work assignments. The clearest example is the virtually uniform obligation imposed on federal executive branch employees to report misconduct to the appropriate authorities, even when investigation of misconduct ordinarily forms no part of the employees' duties.

Government-wide regulations require all executive branch employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11). Individual agencies impose similar obligations, which are often posted at the worksite. The Department of Treasury, for example, requires employees to report "any information" indicating that an employee or contractor engaged in criminal conduct or violated the rules of conduct. 31 C.F.R. § 0.107(a)(3). Employees of the Bureau of Customs and Border Protection (CBP), Department of Homeland Security, are subject to disciplinary action if they fail to report information concerning the violation of a law, policy, or procedure by a fellow CBP employee. *See U.S. Customs and Border Protection Table of Offenses and Penalties, Instruc-*

tions on Use, *available at* http://www.customs.gov/xp/cgov/careers/neo_kit/additional_info/standards_of_conduct/tb_off_penalties.xml (last visited July 20, 2005). Thus, it is fair to say that a federal employee attempting to report government corruption or other malfeasance is merely acting in furtherance of his duties, and would have no constitutional protection against retaliation for doing so, if petitioners' formulation were adopted by this Court.

5. Finally, the adoption of petitioners' test is simply not necessary to protect the government's interests. There is no basis for the contention by petitioners and their *amici* that protection of job-required speech will lead to an "operational nightmare" for government agencies, under which managers attempting necessary and appropriate employment action would be chilled and the courts inundated with a flood of constitutional cases. *See* Pet. Br. at 35-40; U.S. Br. at 22.

As an initial matter, it bears emphasis that the Ninth Circuit's protection of job-required speech is, and has been, the prevailing judicial position for many years. *See* Respondent's Br. in Opposition at 11-18. During this time, there has hardly been a flood of cases threatening to overwhelm the courts. Those cases that are filed in federal court have been, and can continue to be, effectively resolved using the *Pickering* balance.

Pickering requires a "fact-sensitive and deferential weighing of the government's legitimate interests." *Umbehr*, 518 U.S. at 677. In *Umbehr*, the Court concluded that "proper application of the *Pickering* balancing test [can] accommodate the differences between employees and independent contractors," providing the necessary "nuanced approach [that] recognizes the variety of interests that may arise . . . ." *Id.* at 678. Those same principles apply with even greater force here, where the balancing requires only the traditional weighing of the government's interests in effective and

efficient operations against the employee's interest in speaking about matters directly related to his or her duties.

The *Pickering* approach readily accommodates the concerns raised here by petitioners and their *amici*. The government, after all, need only show that its belief that the speech would disrupt the workplace was *reasonable*. *See Waters*, 511 U.S. at 680 (plurality); *id.* at 684-85 (Souter, J., concurring); *Connick*, 461 U.S. at 154. The potential for disruptiveness and interference with legitimate government operations is manifest in the hypothetical cases of an attorney who filed a brief making representations contrary to the instructions of his superiors (U.S. Br. at 22), a White House press secretary who deliberately ignored the President's instructions on the message to be delivered to the press corps (Pet. Br. 36), or a teacher who discussed birth control in a class in violation of school board policy (Nat'l School Boards Assn. Br. at 19).[26] In each of those instances, the interests of the government would readily outweigh the employee's interest in expression. *See, e.g., Waters*, 511 U.S. at 681 (plurality termed the potential disruptiveness enough, "[a]s a matter of law," to outweigh "whatever First Amendment value the speech might

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[26] Petitioners and the Solicitor General analogize employees' work-required speech with government-funded speech, arguing that it can control the message because it has funded the speech. *See* Pet. Br. at 32-34; U.S. Br. at 19-21. In those cases, however, the government has directed that a certain message be conveyed through its funding and is responsible for the content of the state-funded speech. *See Board of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000). Assuming, for the sake of argument, that government-funding cases are applicable at all, their relevance would be confined to cases where the government has directed the employee to deliver a specific message, as in the case of an agency spokesperson. In most cases, of course, the government has not directed its employees to convey a specific message. Instead, it has assigned them tasks, leaving it to them to form judgments and convey their conclusions drawn from their execution of those tasks.

have had"). The nature of the employee's responsibilities and the fact that the expression was made in furtherance of the employee's duties might well be relevant factors adding to the weight of the government's side of the balance.[27] They are not, however, relevant to the *other* side of the balance: whether the speech addresses a matter of public concern.

In short, petitioners have no basis for their dire predictions of an increased litigation burden if allegations of retaliation for speech made in the course of the employee's duties are allowed to survive a motion to dismiss. Even assuming they are correct that the balance cannot be struck in favor of the government as a matter of law (*but see Waters*, 511 U.S. at 681), the government's interests are amply protected under the *Pickering* balancing test. Moreover, we must underscore that adoption of petitioners' proposed test is hardly likely to reduce the litigation burden. As discussed above, courts would be required to wrestle with difficult evidentiary questions regarding the nature of the employee's duties, whether the speech was in furtherance of those duties, and—perhaps worst of all—whether the person was speaking as a "citizen" or an "employee." It seems highly unlikely that these issues could be resolved by motion, without an evidentiary hearing.

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[27] Without suggesting how it would resolve the balance in any specific situation, the Court noted in *Pickering* that the balancing could be affected by such considerations as whether there was a great need for confidentiality or whether "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them . . . ." 391 U.S. at 570 n.3. *Accord Rankin*, 483 U.S. at 390-91 (in weighing the State's interest, "some attention" must be paid to employee's job responsibilities, for the "burden of caution" borne by the employee varies with "the extent of authority and public accountability" the employee's job entails); *Lewis*, 165 F.3d at 162 (*Pickering* balance affected by nature of responsibilities, including degree of confidentiality, policy-making, or public contact in employee's job).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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